TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 511. 218.

PACIFIC LAND AND IMPROVEMENT COMPANY, APPELLANT,

vs.

ELWOOD OIL COMPANY, BAKERSFIELD AND FRESNO OIL COMPANY, KERN RIVER OIL COMPANY, AND BLACK JACK OIL COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 6, 1902.

(18,384.)

(18,364.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 511.

PACIFIC LAND AND IMPROVEMENT COMPANY, APPELLANT,

vs.

ELWOOD OIL COMPANY, BAKERSFIELD AND FRESNO OIL COMPANY, KERN RIVER OIL COMPANY, AND BLACK JACK OIL COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Stipulation as to printing record	1	1
Appearance of counsel	3	2
Citation	4	2
Transcript from the circuit court of the United States for the southern district of California	6	4
Bill of complaint	6	4
Subpœna	26	14
Marshal's return	27	15
Joint and several demurrer of Elwood Oil Company *et al*	29	15
Order sustaining demurrer, denying injunction, &c.	33	17
Decree	34	18
Petition for appeal	36	19
Allowance of appeal	37	19

Judd & Detweiler, Printers, Washington, D. C., February 1, 1902.

	Original.	Print
Assignment of errors	38	20
Order allowing appeal, &c	42	22
Bond on appeal	43	22
Clerk's certificate	46	24
Opinion, Hawley, J.	48	25
Dissenting opinion, Gilbert, J.	77	41
Decree	85	45
Petition of appeal	86	46
Allowance of appeal	86	46
Assignment of errors	87	46
Bond on appeal	91	49
Clerk's certificate	93	50
Citation	94	51
Proof of service of citation	95	51

a In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC LAND AND IMPROVEMENT CO., Appellant,
vs.
ELWOOD OIL CO. ET AL., Appellees. } No. 672.

Transcript of Record.

Appeal from the circuit court of the United States for the southern district of California.

(Endorsed:) Filed Jan. 18 1901. F. D. Monckton, clerk.

1 In the United States Circuit Court of Appeals.

COSMOS EXPLORATION COMPANY, Complainant,
vs.
GRAY EAGLE OIL COMPANY ET AL., Defendants. } No. —.

PACIFIC LAND AND IMPROVEMENT COMPANY, Complainant.
vs.
ELWOOD OIL COMPANY ET AL., Defendants. } No. —.

Stipulation as to Printing Record, etc.

It is hereby stipulated that the opinion of Hon. E. M. Ross filed in these causes need be printed in but one only of the records, and may be considered as printed in the other. Copies of the record in which it is printed shall, however, be served upon the parties, or the attorneys, in the other cases.

And provided, further, that should one only of the cases heard in the circuit court of appeals be taken to the supreme court of
2 the United States, the record on that appeal shall contain the opinion of the said circuit court.

In making this stipulation, the defendants in error do not waive the right to have printed every paper material to the determination of these causes, but only that the opinion of the judge need be printed in but one, but shall be considered as a part of the record in the other case.

JEFFERSON CHANDLER,
VAN NESS & REDMAN,
SHIRLEY C. WARD,
J. W. SWANWICK,
Attorneys for Complainant.
C. LINKENBACH,
FRANK H. SHORT,
GEO. W. BAKER,
J. S. CHAPMAN,
Attorneys for Defendants.

(Endorsed:) Nos. 671 and 672. Original. In the United States circuit court of appeals, ninth circuit. Cosmos Exploration Co., Pacific Land & Imp. Co., plaintiff, *vs.* Gray Eagle Oil Co., *et al.*, Elwood Oil Co., *et al.*, defendants. Stipulation as to printing record, etc. Filed January 11, 1901. F. D. Monckton, clerk. Frank H. Short, C. Linkenbach, Jno. S. Chapman, attorneys for defendants.

3 United States Circuit Court of Appeals for the Ninth Circuit.

THE PACIFIC LAND AND IMPROVEMENT COMPANY, (a Corporation), Complainant,
vs.
THE ELWOOD OIL COMPANY (a Corporation), THE KERN River Oil Company (a Corporation), The Bakersfield and Fresno Oil Company (a Corporation), The Black Jack Oil Company (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants and Respondents. } No. —.

Appearance of Counsel for Defendants and Respondents.

The clerk will enter our appearance as counsel for the defendants and respondents, The Elwood Oil Company, The Bakersfield and Fresno Oil Company, The Kern River Oil Company, and The Black Jack Oil Company.

JOHN S. CHAPMAN,
GEO. W. BAKER,
FRANK H. SHORT,
Attorneys for Elwood Oil Company, The Bakersfield and Fresno Oil Company, The Kern River Oil Company, and The Black Jack Oil Company, Above Named as Defendants and Respondents.

4 (Endorsed:) No. 672. United States circuit court of appeals, for the ninth circuit. The Pacific Land and Improvement Company, complainant, *vs.* The Elwood Oil Company *et al.*, defendants and respondents. Appearance. Filed December 20, 1900. F. D. Monckton, clerk. John S. Chapman, Los Angeles, Cal., attorney for defendants and respondents.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Elwood Oil Company (a corporation), the Bakersfield and Fresno Oil Company (a corporation), the Kern River Oil Company (a corporation), the Black Jack Oil Company (a corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be

held at the city of San Francisco, in the State of California, on the 21st day of December, A. D. 1900, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, from a final decree signed, filed, entered and recorded on the 26th day of September, 1900, in that certain cause being in equity No. 4, northern division, wherein The Pacific Land and Improvement Company, a corporation, is complainant and appellant and you are defendants and appellees, to show cause, if any there be, why the decree rendered against said appellant in the said order allowing the appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Erskine M. Ross, United States circuit judge for the ninth judicial circuit, this 13th day of December, A. D. 1900, and of the Independence of the United States, the one hundred and twenty-fifth.

ERSKINE M. ROSS,
United States Circuit Judge for the Ninth Judicial Circuit.

Service of the within citation is hereby admitted this December 13th, 1900.

FRANK SHORT,
GEO. W. BAKER,
J. S. CHAPMAN.
Attorneys for Defendants Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company, and Black Jack Oil Company.

(Endorsed:) Original. In the United States circuit court of appeals, for the ninth circuit. Pacific Land and Improvement Company, (a corporation), appellant, *vs.* Elwood Oil Company (a corporation), *et al.*, appellees. Citation. Filed December 14, 1900. Wm. M. Van Dyke, clerk.

6 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division. In Equity.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Complainant,
vs.
ELWOOD OIL COMPANY (a Corporation), BAKERSFIELD and Fresno Oil Company (a Corporation), Kern River Oil Company (a Corporation), Black Jack Oil Company (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants. } No. —.

Bill of Complaint.

To the honorable the judges of the circuit court of the United States, ninth circuit, in and for the southern district of California, northern division, sitting in equity:

The complainant, Pacific Land and Improvement Company, a corporation, files this, its bill of complaint, against The Elwood Oil Company, a corporation, The Bakersfield and
7 Fresno Oil Company, a corporation, The Kern River Oil Company, a corporation, The Black Jack Oil Company, a corporation, John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, defendants, and thereupon your orator complains and says:

I.

That the defendants, Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company and Black Jack Oil Company are each and all corporations organized and existing under the laws of the State of California, and citizens and residents of the State of California and inhabitants of the southern district thereof, and your orator is, and at all times since the seventh day of February, 1900, has been, a corporation organized and existing under the laws of the State of Nevada, a citizen and inhabitant of the said State; that the defendants John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, Henry Roe, James Roe and Samuel Roe are unknown to your orator at this time, and hence are sued by such fictitious names, and your orator prays that it may insert their true names herein when ascertained.

II.

That the matter in dispute in this suit exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and
8 this controversy, as will be hereinafter shown, arises under the laws of and involves the construction of the statutes of the United States.

III.

That the complainant is the owner of the east one-half (E. ½) of the southwest quarter (S. W. ¼) of section 4, in township 29 south, range 28 east, Mt. Diablo base and meridian, in Kern county, California, containing eighty (80) acres of land, and that the full and complete equitable title thereto is now vested in the complainant; that the defendants claim, and each of them claims and asserts, an estate or interest in said property adverse to complainant's title thereto, but that such claim and assertion are wholly without right, unjust and unfounded; that the rights of the respective parties hereto to said land, its title and possession depend upon and exist by virtue of the matters and things hereinafter more particularly set forth, viz:

IV.

That the Congress of the United States, by its act entitled "An act making appropriation for sundry civil expenses of the Government *of* the fiscal year ending June 30th, 1898, and for other purposes," approved on June fourth, 1897, *and* provided as follows: "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, is he desires so to do, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent, and no charge shall
9 be made in such case for making the entry or issuing the patent to cover the tract selected. Provided, further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claim, credit being allowed for the time spent on the relinquished claims."

V.

That on the 20th day of December, 1899, one J. R. Johnston was the owner by title in fee-simple absolute, free of any lien or encumbrance, of a tract of eighty (80) acres of land, which land was then and still is a non-mineral tract, covered by a *bona fide* patent issued by the United States, and said tract was then and still is included within the limits of a public forest reservation of the United States.

VI.

That on the 23d day of December, 1899, the east one-half (E. ½) of the southwest quarter (S. W. ¼) of section 4 in township 29 south, range 28 east, M. D. B. & M., containing eighty (80) acres of land, and no more, was, and for more than one year continuously theretofore had been, a tract of surveyed, unappropriated, and vacant public land of the United States, open to settlement, returned and characterized upon the official records of the United States as agricultural land, free and open to settlement and entry under the laws of the United States, and the said land did not then contain any known

mines, known salines, or known minerals, or known petroleum
10 or known mineral oils; nor had any minerals or petroleum
or known mineral oils, or mineral substances of any kind, ever been discovered within the limits thereof; your orator further says that the land in this paragraph described is situate in the county of Kern, within the southern district of California, and within the district of lands subject to sale and disposition by the United States land office at Visalia, California.

VII.

That on the 20th day of December, 1899, said J. R. Johnston then being the owner of the tract of land referred to in paragraph V hereof, by title in fee-simple absolute, and free of any lien or incumbrance, desiring to avail himself of the act of Congress referred to in paragraph IV hereof, duly relinquished all of the said tract to the Government of the United States by deed of conveyance, duly relinquishing and conveying the same to the United States of America, and recorded said deed in the office of the county recorder of the county in which said land was situate, and on the 23d day of December, 1899, the said J. R. Johnston, duly delivered to the register and receiver of the United States land office at Visalia, California, and filed in said United States land office his said deed to the United States, indorsed and recorded as aforesaid, together with his selection of the land described in paragraph VI hereof in lieu of the lands referred — in paragraphs V hereof, and at the same time
said Johnston filed with said register and receiver a non-mineral
11 affidavit showing the selected tract contained no known minerals, and at the same time said Johnston delivered to and filed with said register and receiver a full, true, and correct abstract of his title to the said relinquished tract, duly certified as such by the county recorder of the county in which said tract was situate, showing him (the said J. R. Johnston) to be the owner thereof by title in fee-simple absolute, free of any lien or incumbrance, at the time of such relinquishment and at the time said deed to the United States was made, and showing that such, his said conveyance to the United States, vested in the United States the full, complete, and perfect title thereto.

VIII.

That on the said 23d day of December, 1899, the register and receiver of the United States land office, at Visalia, California, duly accepted, received, and filed the deed, abstract of title, non-mineral affidavit and selection of said J. R. Johnston, and duly entered such selection upon the official records of the said land office, and the register of the said land office did then and there certify that the said land so selected by said Johnston, viz., the east one-half (E. ½) of the southwest quarter (S. W. ¼) of section 4, township 29 south, range 28 east, M. D. B. & M., containing eighty (80) acres of land, was free from conflict, and that there was no adverse filing, entry or claim thereto; and said Johnston thereupon, and thereby, became vested with the complete equitable title to the said lands so

selected, and was thereupon and thereby entitled to receive a
12 patent for said lands from the United States, in pursuance of his said selection thereof, under the terms and in pursuance of the provisions of the act of Congress referred to in paragraph IV hereof.

IX.

That by virtue of the matters and things hereinbefore set forth, on the 23d day of December, 1899, the said J. R. Johnston, became and was entitled to the possession of the said east one-half of the southwest one-quarter of section 4, in township 29 south, range 28 east, M. D. B. & M., and to the quiet, peaceable, uninterrupted and exclusive enjoyment of the same; that on the 11th day of April, 1900, the said J. R. Johnston, by an instrument in writing, duly sold, transferred, and conveyed the said tract of land and all of his right, title, and interest therein and thereto to your orator, who ever since has been and still is the owner thereof.

X.

Your orator alleges and claims that by virtue of the allegations and facts hereinabove stated and the law hereinabove quoted and relied upon said Johnston exchanged the land referred to in paragraph V herein for the land described in paragraph VI herein; your orator claims that under the terms of said exchange and by virtue of the operation of said law, under which said exchange took place, the full, complete, and equitable title to the lands selected by said Johnston, described in paragraph VI thereof, became then and there, upon the 23d day of December, 1899, vested in said Johnston by virtue
13 of the said exchange, without further act on his part; and your orator further claims that by virtue of the terms of said exchange, and the operation of said law, under which said exchange was accomplished, and by virtue of the deed from said Johnston to your orator, it is entitled to a patent to the lands so selected in lieu of the forest-reserve land so exchanged, as aforesaid. But your orator alleges that defendants controvert and deny said claim herein made by your orator to a perfect, equitable title to said land, and deny your orator's right to the exclusive, or any possession thereof; and defendants claim that the title to the land obtained by said Johnston, in exchange for the lands surrendered to the Government by him, as aforesaid, did not vest in him a perfect, equitable title, as herein stated, or any title thereto, and claim that neither he nor your orator is entitled to the exclusive or any possession thereof, but that notwithstanding the selection of said land by said Johnston, and his full compliance with the provisions of the said act of Congress, as aforesaid, the defendants claim that under the true and proper construction of the act of Congress aforesaid, the land described in paragraph VI hereof remained subject to entry, exploration, location and purchase as mineral land by themselves or any other citizen of the United States, until (if ever) a patent is issued to the said J. R. Johnston or your orator in pursuance of the

selection thereof, as aforesaid; which contention of the defendants your orator controverts, as hereinbefore more particularly
14 set forth; and said defendants claim that they, the defendants, have a right under the mineral laws of the United States, relating to placer mining claims, and to petroleum lands, to enter upon said lands and to explore thereon and therein for petroleum and mineral oils; and since said land was selected by said Johnston, as aforesaid, the defendants, as hereinafter alleged, have entered thereupon and bored for and obtained petroleum thereon, and are now engaged in marketing the same therefrom.

Wherefore, your orator alleges that a controversy has arisen between your orator and said defendants under the laws of the United States in respect to said land and its rights thereto and possession thereof, necessarily involving the construction and interpretation of the statutes and laws of the United States.

XI.

That the defendants herein base their rights in, and title to the premises described in paragraph VI hereof upon a certain pretended placer mining location, covering the southwest quarter of said section four, alleged to have been made upon the 11th day of June, 1899, under the mining laws of the United States by J. F. Elwood, H. M. Rodgers, Frank R. Lindsey, D. S. Snodgrass, V. I. Willis, F. M. Garrison, A. B. Elmore and George L. Hoxie, under whom the defendants claim to have acquired title by mesne conveyance; but your orator alleges that said alleged placer mining location of said southwest quarter of said section four, was and is illegal and void and of no vitality whatsoever, for the following
15 reasons, among others, viz: That the same was not based upon any discovery of mineral thereon, or of petroleum oil thereon, and no discovery of mineral or oil was made thereon, until after the said land was selected by said J. R. Johnston, as aforesaid, under the act of Congress set up in paragraph IV hereof.

And your orator alleges that said location was further invalid in this: That seven of the eight persons who located or attempted to locate such placer mining claim upon the 11th day of June, 1899; also on the same day located or attempted to locate the following immediately adjoining and contiguous property as placer mining claimants, viz: the northeast quarter of said section four, the name of James Berry being substituted instead of that of A. B. Elmore as one of the locators of said northwest quarter, and in all other respects the locators of said northwest quarter were the same as of the southwest quarter; also the northeast quarter of said section four; the name of F. K. Wiseman being substituted in said last-named location as one of the locators thereof, instead of that of A. B. Elmore, and in all other respects the locators of the northeast quarter were the same as the locators of the southwest quarter thereof; also the north one-half of the southeast quarter of said section four; the name of F. K. Wiseman being substituted in said last-named location as one of the locators thereof, instead of that of A. B. Elmore, and in all other

respects the locators of the said north one-half of the south-
16 east quarter of said section are the same as the locators of the southwest quarter thereof; that such practice of the same persons locating contiguous territory as placer mining ground, so as to give each more than twenty acres, is in violation of the spirit, purpose and intent of the United States mining laws.

XII.

That after said lands described in paragraph VI hereof were selected by said Johnston, as herein described, viz., on the 12th day of February, 1900, the defendants herein, The Elwood Oil Company, and The Bakersfield and Fresno Oil Company, together with J. F. Elwood, H. M. Rogers, Frank R. Lindsey, D. S. Snodgrass, F. M. Garrison, V. I. Willis, James Berry and George L. Hoxie, filed in the United States land office at Visalia, California, a written verified protest against the said selection of said Johnston, wherein they alleged that the lands selected by said Johnston were not subject to selection by him under the act of June 4th, 1897, referred to in paragraph IV hereof, on the ground that the same were mineral lands, and were included within the boundaries of a valid placer mining location, and that such protest prays that the Commissioner of the General Land Office order a hearing to determine the mineral character of said land, and that the selection of said Johnston be rejected and disapproved, and said protest is now pending before the Commissioner of the General Land Office, upon a motion to dismiss the same made by said Johnston, upon the ground that the protest fails to show that petroleum in profitable quantities, or any quantity,
17 was being produced upon the land involved herein, when the same was elected by said Johnston, or at any time prior thereto; and on the ground that said protest fails to show that any known mine or producing oil well existed upon the land involved therein, when said land was selected by said Johnston; and on the ground that said protest fails to show any production at any time of petroleum sufficient to warrant or justify a hearing to determine the character of said land; and on the ground that all allegations or claims of discoveries of petroleum made after the date of said selection of said land by said Johnston, are irrelevant and immaterial, in that discoveries of oil, after the selection of said land by said Johnston, cannot operate to change the character of the land, as fixed by its known character at the date of its selection by said Johnston, nor operate to change or affect the rights of said Johnston, under his said selection.

And your orator alleges that said protest does not show that there was any known mine, or any known salines, or known or existing petroleum wells or known petroleum deposits on said land, or on the southwest quarter of said section at the time said land was selected by said Johnston, as aforesaid, which showed such land or any part thereof, was more valuable for mining or petroleum production than for agricultural or otherwise; and your orator alleges that such protest failing to show such facts is insufficient to warrant or justify a hearing being ordered by the Land Department of the

United States to re-establish or redetermine the character of
18 said land, or to change the present classification thereof, as fixed by the former report of the surveyor general, and the confirmation thereof by the Land Department as hereinabove mentioned, and is insufficient to impair or affect the validity of said Johnston's selection thereof; and your orator alleges that under the law giving jurisdiction to the Land Department of the United States to dispose of the public lands, and under the rules and regulations of said department promulgated to govern contests or protests against selections of land under the act of Congress of June 4th, 1897, set up in the fourth paragraph hereof, only sixty days after published notice of selection under such act *is* given, and allowed to any person or persons to file protests in the local land office of the United States against selections under the said law of June 4th, 1897, or to file an adverse claim to the land selected. That notice of such selection of said land by said Johnston was given and published upon the 28th day of December, 1899, and the only protest or adverse claim filed against said selection is the protest of defendants hereinabove referred to; that such protest, as above stated, does not state any facts which impair or affect the rights of said Johnston or of your orator in said selected land, or show any grounds why United States patent therefor should not issue to the said Johnston. That defendants are bound and estopped by their said protest and its contents; and the facts herein stated, if admitted, do not show that defendants have any interests in said lands as against
19 said Johnston, or against the complainant; and your orator alleges that upon the facts as plead by said protest, the Land Department of the United States cannot lawfully refuse or deny the issuance of patent to said Johnston, and under such facts said Johnston is entitled to the approval of his said selection by the Land Department of the United States and to the issuance of United States patent therefor.

XIII.

That notwithstanding said J. R. Johnston was the complete, equitable owner of the land described in paragraph VI hereof and was entitled to the complete, quiet, peaceable, uninterrupted, and exclusive enjoyment and possession of the same, up to the time of the conveyance of said land by said Johnston to your orator, as hereinbefore set forth, the defendants herein, and each of them, against the desires and will of said Johnston, and knowing that said land had been selected by said Johnston under the act of Congress aforesaid, and knowing the rights of said Johnston, in the premises, and without right in themselves or either or any of them, did, on or about the 6th day of January, 1900, by themselves and their employees, without right, title, or claim so to do, wrongfully and unlawfully and without the knowledge or consent of said Johnston, and in disregard of the rights of said Johnston, enter into and upon the said east one-half of the southwest quarter of section four, township 29 south, range 28 east, M. D. B. & M., and erect a derrick and

other machinery thereon, and proceed to excavate the soil
20 thereof, and to bore a well and to drive iron pipes therein,
against the will and without the consent or knowledge of said Johnston, seeking for petroleum oil and other mineral products in said land, for the purpose of taking the same, if found, to their own use and removing the same. That thereafter, on or about the last day of January, 1900, the said defendants discovered and found in said well petroleum oil in profitable quantities, and that defendants are now wrongfully and unlawfully, and without the consent of said Johnston, and without the consent of your orator, in possession of said premises, and are now unlawfully and continuously from day to day, pumping large quantities of petroleum oil from said well, and removing the same from said land, and selling, disposing of, and marketing the same, the property of your orator, and appropriating the proceeds thereof to their own use, to your orator's great loss and damage; and will continue so to do, to the great waste and irreparable injury and damage to said premises and to your orator, unless restrained therefrom by this honorable court, and are daily slandering your orator's title, clouding the same and giving out and proclaiming that your orator has no rights in said premises, and by their said conduct, the defendants prevent your orator's enjoyment or sale of said property; and threaten that they and their employees will do personal violence to any one representing your orator who comes upon said premises in any manner to peaceably protect said property from waste, spoliation, or diminution of value by defendants; and your orator verily believes
and alleges that said threats will be executed should your
21 orator or any of its representatives come upon said lands
for the purpose of inspecting the same or investigating the actions of the defendants concerning the production and marketing of petroleum therefrom unless restrained therefrom by this honorable court; that defendants threaten to, and unless restrained by this court, your orator verily believes and alleges that they will, bore other wells upon said premises, and if successful in obtaining petroleum therein, they will take such petroleum therefrom, and market the same for their own use and benefit; that if such excavation, drilling and boring by the defendants, and their taking from such lands the petroleum products thereof and marketing the same is allowed to continue, the right so to do in defendants will ripen into an easement in said lands, and irreparably impair the value of your orator's right, title, and interest therein; that your orator has no complete or adequate legal remedy against the wrongs herein complained of by the strict rules of the common law, and can only have relief in a court of equity where matters of such nature are properly cognizable.

XIV.

That in the community in which such land is located, angry and violent feelings exist in the minds of the people against all persons seeking or attempting to acquire title to lands in that locality under the provisions of the act of Congress of June 4, 1897, as aforesaid,

and that no one in said community who is in sympathy or in affiliation with those attempting to acquire title to lands in such
22 manner, dare show his sympathy or affiliation, for fear of personal violence and social ostracism being visited upon him; that so strong is the public feeling in such community against parties attempting to acquire title to lands under such act, that parties claiming title to lands under the placer mining laws, adversely to those claiming the same lands under the act of Congress of June 4, 1897, have notified the latter that there was no law in the land which could dispossess or deprive the said placer claimants of such lands, or establish the title of their adversaries thereto; and that death and bloodshed would follow before any decree of court to that effect could be executed; and your orator verily believes that the only means of assuring the enforcement of a temporary injunction of this court, restraining the defendants from further boring in or removing oil from the premises in controversy, until the further order of the court, will be by the appointment of a receiver to take possession of and protect said property and preserve its present status until the final decree of the court herein; and your orator further believes and alleges that without the protection of this court by means of a receiver in possession of said property, pending this litigation, your orator will not be able to go upon said lands, or send its representatives thereon to obtain the necessary evidence to refute any showing that defendants may make upon an order to show cause why an injunction should not issue restraining defendants, pending this suit, from further boring in or removing oil from the premises in controversy. And your orator believes and alleges that in order
23 to make a temporary *ex parte* restraining order against the defendants in this case effective, and in order to preserve the existing status of said property, and to preserve the evidence upon which your orator's rights in the premises depend, and to the end that your orator and its representatives may have free access to said property, pending this litigation, to inspect, examine and investigate the same, so as to show its true condition and all the facts affecting your orator's rights in the premises, it is necessary that a receiver be appointed by this court at the time of filing suit herein, to take charge —, protect and preserve the property in controversy, and to see that any restraining order issued by the court be not violated.

Wherefore, your orator prays that this honorable court now grant it a writ of injunction, restraining and enjoining the defendants and each of them, their and each of their assigns, agents, servants and employees, from hereafter in anywise interfering with the entry upon the lands described in paragraph VI hereof, viz., the east one-half of the southwest quarter of section four, township 29 south, range 28 east, M. D. B. & M., by your orator or its representatives or employees for the purpose of inspecting, examining or investigating the same and the conditions existing thereon; and restraining and enjoining the defendants and each of them, and their and each of their assigns, agents, servants and employees, from excavating or

digging upon or into the said lands, or from drilling or boring into said lands, or from pumping or taking any petroleum oil from the well thereon, or from marketing or disposing of any petro-
24 leum oil therefrom, until the further order and decree of this court in the premises, and that upon final hearing, the said injunction be made perpetual by an order and decree of this court. That your orator have a decree of this court that the full and complete equitable title to said property is now vested in your orator, and that the adverse claims of defendants thereto are wholly without right and unfounded, and that complainant have judgment for the possession thereof; and that a receiver be appointed by this court to take possession of said lands and to preserve the same and the product thereof now on the premises, until the further order of this court, but not to operate the well thereon, except to the extent necessary, if at all, to preserve the same from deterioration in value, nor to market or remove any oil from said premises. And that your orator have such other and further relief as the nature of this case may require and as — your honor may seem meet, including cost.

May it please your honor to grant unto your orator a subpœna to be directed to said Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company, and Black Jack Oil Company, thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited, to personally appear before your honor, then and there full, true, direct and perfect answer make to all and singular the premises, but
25 not under oath, the benefit of which is waived; and to stand to, perform and abide such further order, direction and decree as your honor shall deem agreeable to equity and good conscience.

JEFFERSON CHANDLER,
SHIRLEY C. WARD, AND
J. W. SWANWICK,
Solicitors for Complainant.

COUNTY OF LOS ANGELES, } ss:
State of California, }

Frank D. Lewis, being duly sworn, says that he is the secretary of The Pacific Land and Improvement Company, a corporation, the complainant named in the foregoing entitled suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

FRANK D. LEWIS.

Subscribed and sworn to before me, this the 1st day of August, 1900.

[SEAL.] H. S. G. McCARTNEY,
Notary Public in and for the County of Los Angeles, State of California.

26 (Endorsed:) No. 4. United States circuit court, ninth circuit, northern division of the southern district of California. In equity. Pacific Land and Improvement Co. (a corporation), complainant, *vs.* Elwood Oil Company (a corporation) *et al.*, defendants. Bill of complaint. Filed August 4, 1900. Wm. M. Van Dyke, clerk. Charles N. Williams, deputy.

Subpœna ad Respondendum.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division. In Equity.

The President of the United States of America, Greeting, to Elwood Oil Company (a corporation), Bakersfield and Fresno Oil Company (a corporation), Kern River Oil Company (a corporation), Black Jack Oil Company (a corporation):

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in Fresno, on the 1st day of October, A. D. 1900, to answer a bill of complaint exhibited against you in said court by the Pacific Land and Improvement Company, a corporation, organized and existing under the laws of the State of Nevada, and a citizen and in-
27 habitant of the said State, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of August, in the year of our Lord one thousand nine hundred, and of our Independence the one hundred and twenty-fifth.

[SEAL.] WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of October next, at the clerk's office of said court pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

Clerk's office, Los Angeles, California.

Form No. 570.

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby return that I received the within writ on the 16th day of August, 1900, and personally served the same on the 18th
28 day of August, 1900, on Kern River Oil Company, a corporation, and on the 22d day of August, 1900, on Black Jack Oil Company, by delivering to and leaving with (on said August 18th, 1900) E. C. Landis, secretary of said Kern River Oil Company, and on said August 22, 1900, with W. C. Jacobs, president of said Black Jack Oil Company, said defendants named therein, at the city and county of San Francisco in said district, an attested copy thereof.

San Francisco, August 22d, 1900.

JOHN H. SHINE,
United States Marshal,
By R. DE LANCIE, *Deputy*.

(Endorsed:) Original No. 4. United States circuit court, ninth circuit, southern district of California. Northern division. In equity. Pacific Land and Improvement Company (a corporation), *vs.* Elwood Oil Company (a corporation) *et al.* Subpœna. Filed September 7, 1900. Wm. M. Van Dyke, clerk.

29 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division. In Equity.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Complainant,
vs.
ELWOOD OIL COMPANY (a Corporation), BAKERSFIELD & Fresno Oil Company (a Corporation), Kern River Oil Company (a Corporation), Black Jack Oil Company (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants. } No. 4.

Joint and Several Demurrer of Elwood Oil Co. et al.

The joint and several demurrers of The Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company, Black Jack Oil Company, four of the defendants above named, to the bill of complaint of The Pacific Land and Improvement Company, the above-named complainant.

These defendants, respectively, by protestation, not con-
30 fessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show:

I.

That enough does not appear upon the face of the bill to show this court's jurisdiction of the subject-matter of the suit.

II.

That the said complainant has not, in or by the said bill, made or stated any such cause as doth or ought to entitle it to any relief as is therein sought and prayed for, from and against these defendants, or either of them.

III.

That it appears by the said bill that the same is exhibited against these defendants, and the several other persons therein named as defendants thereto, for distinct matters and causes, in some of which, as appears by the said bill, these defendants are not, nor is either of them, in any manner interested or concerned, and that it asserts or claims title in the plaintiff to two different tracts of land, acquired by two separate and distinct titles, and that all of the said defendants are not interested in either of the said tracts of land, nor in the plaintiff's alleged title thereto, and that the said bill is altogether multifarious.

IV.

That it appeareth by the plaintiff's own showing, by the said bill, that it is not entitled to the relief prayed by the bill
31 against these defendants, or either or *of* any of them, nor to any relief against these defendants, or either of them or any of them.

Wherefore, and for divers other good causes of demurrer appearing on said bill, these defendants do demur thereto, and they pray the judgment of this court whether they, or any of them, shall be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed *by* their reasonable costs in this behalf sustained.

J. S. CHAPMAN,
GEO. W. BAKER, AND
FRANK H. SHORT,
Solicitors for the said Defendants.

NORTHERN DIVISION,
SOUTHERN DISTRICT OF CALIFORNIA, } *ss:*
County of Los Angeles,

F. R. Lindsey makes solemn oath and says that he is the vice-president of the above-named Bakersfield and Fresno Oil Company, a corporation, and that the foregoing demurrer is not in-*re*posed for delay, and that the same is true in point of fact.

F. R. LINDSEY.

Subscribed and sworn to before me this 27th day of August, 1900.
[SEAL.] WM. M. VAN DYKE, *Clerk*,
By E. H. OWEN, *Deputy.*

32 We hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.
Dated this 27th day of August, 1900.

J. S. CHAPMAN.
GEO. W. BAKER.
FRANK H. SHORT.

(Endorsed:) No. 4. J. S. Chapman. In the United States circuit court, ninth circuit, southern district of California, northern division. Pacific Land & Improvement Company, plaintiff, *vs.* Elwood Oil Company, defendant. Demurrer. Filed *nunc pro tunc* as of August 27th, 1900. Wm. M. Van Dyke, clerk. By E. H. Owen, deputy. Jno. S. Chapman, attorney for ——.

At a stated term, to wit, the July term, A. D. 1900, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, southern division, held at the court-room in the city of Los Angeles on Monday, the twenty-fourth day of September, in the year of our Lord, one thousand nine hundred.
Present: The Honorable Erskine M. Ross, circuit judge.

33 PACIFIC LAND AND IMPROVEMENT Company (a Corporation), Complainant, *vs.* ELWOOD OIL COMPANY (a Corporation), *et al.*, Defendants. } No. 4 (Northern Division).

Order Sustaining Demurrer, Denying Injunction, etc.

This cause having heretofore been submitted to the court for its consideration and decision on the application of complainant for a receiver and for an injunction, and also upon the joint and several demurrer of defendants, The Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company and Black Jack Oil Company, to the bill of complaint, and the court having duly considered the same and being fully advised in the premises, it is now, on this 24th day of September, 1900, being a day in the July term, A. D. 1900, of said circuit court, ordered that the application for a receiver and for an injunction be and the same hereby is, denied, that the demurrer be and hereby is sustained, and that the bill of complaint be dismissed at complainant's cost.

(Endorsed:) No. 4. United States circuit court, ninth circuit, southern district of California, northern division. Pacific Land and Improvement Company (a corporation), *vs.* Elwood Oil Company (a corporation), *et al.* Copy order denying application for a receiver and injunction, sustaining demurrer and dismissing bill.

34 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Northern Division. In Equity.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Complainant,
vs.
ELWOOD OIL COMPANY (a Corporation), BAKERSFIELD AND Fresno Oil Company (a Corporation), Kern River Oil Company (a Corporation), Black Jack Oil Company (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants. } No. 4.

Decree.

This cause having been brought on to be heard at the present July term, A. D. 1900, of said circuit court, upon the application of complainant for a receiver and for an injunction, and also upon the joint and several demurrer of defendants, The Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company and Black Jack Oil Company, to the bill of complaint,
35 and having been argued by counsel and submitted to the court for its consideration and decision, and the court, after due consideration thereof, having, on the 24th day of September, 1900, ordered that the applications for a receiver and for an injunction be denied, and that the said demurrers be sustained, and the bill dismissed at the complainant's cost.

It is therefore ordered, adjudged and decreed that said bill of complaint be, and the same hereby is, dismissed, and that the defendants have and recover of and from said complainant their costs and disbursements in this behalf taxed at $51.80.

Los Angeles, September 26th, 1900.

ROSS,
Circuit Judge.

Decree entered and recorded September 26th, 1900.

WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 4. United States circuit court, ninth circuit, southern district of California, northern division. Pacific Land and Improvement Company *vs.* Elwood Oil Co. *et al.* Decree. Filed September 26, 1900. Wm. M. Van Dyke, clerk.

36 In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Northern Division. In Equity.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Plaintiff,
vs.
ELWOOD OIL COMPANY ET AL., Defendants. } No. —.

Petition for Appeal and Order Allowing Same.

The above-named plaintiff, conceiving itself aggrieved by the decree made, entered and recorded on the 26th day of September, 1900, in the above-entitled cause, and dismissing complainant's bill at its costs does hereby appeal from said decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and the amount of complainant's bond on such appeal be fixed, and that the transcript of the record, proceedings and papers, upon which said decree was made,
37 duly authenticated may be sent to the United States circuit court of appeals for the ninth circuit.

Dated 19th day of November, 1900.

JEFFERSON CHANDLER,
VAN NESS & REDMAN,
SHIRLEY C. WARD, AND
J. W. SWANWICK,
Solicitors for Complainant.

The foregoing claim of appeal is allowed, and the bond therein fixed at the sum of $300.00.

Dated November 21st, 1900.

ROSS,
Circuit Judge.

(Endorsed:) 4. Original. In the circuit court of the United States, in and for the ninth circuit, southern district of California, northern division. Pacific Land and Improvement Company (a corporation), complainant, *vs.* Elwood Oil Company (a corporation) *et al.*, defendants. Petition for appeal. Filed November 21, 1900. Wm. M. Van Dyke, clerk. Harris & Swanwick, attorneys and counselors at law, 402–403 Bullard block, Los Angeles, California.

38 In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Northern Division. In Equity.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Plaintiff,
vs.
ELWOOD OIL COMPANY ET AL., Defendants. } No. —.

Assignment of Errors.

Comes now complainant, by Jefferson Chandler, Van Ness & Redman, Shirley C. Ward, and J. W. Swanwick, its solicitors, and files the following assignment of errors, upon which it will rely upon its appeal from the decree made by the above-entitled court upon the 26th day of September, 1900.

I.

That said court erred in sustaining the demurrer of defendants, The Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company and Black Jack Oil Company to the plaintiff's bill of complaint.

II.

39 That said court erred in sustaining the first ground of the demurrer interposed by said defendants above named to said bill of complaint, and by adjudging and deciding that enough does not appear upon the face of said bill to show that said court had jurisdiction of the subject-matter of this action.

III.

That said court erred in sustaining the second ground of said demurrer interposed by said defendants to said original bill of complaint, and by adjudging and deciding that said complainant did not, in or by said bill of complaint make or state any such cause of action as doth or ought to entitle it to any relief as is therein sought and prayed for from and against said defendants so demurring as aforesaid, or either of them.

IV.

That said court erred in sustaining the third ground of the demurrer interposed by said defendants to said bill of complaint, and by adjudging and deciding that said bill of complaint is multifarious.

V.

That said court erred in sustaining the fourth ground of said demurrer interposed by said defendants to said bill of complaint, and by deciding that by complainant's own showing by said bill, it, complainant, was not entitled to the relief prayed for by said bill against the defendants so demurring as aforesaid, or against either of them, nor to any relief against said defendants, or either or any of them.

40 VI.

That said court erred in dismissing complainant's bill and in ordering that defendants have and recover of and from said complainant their costs and disbursements herein.

VII.

That said court erred in dismissing said complainant's said bill of complainant, because the allegations of said bill of complaint show that the plaintiff is the equitable owner of the lands in controversy, and that none of the defendants have any rights therein, and the injury complained of is irreparable in its nature.

VIII.

That said court erred in dismissing complainant's said bill of complaint because the allegations of said bill of complaint show that plaintiff is entitled to equitable relief of injunction restraining defendants from continuing commission of the acts of waste alleged in said bill of complaint, until such time as the title to the premises in controversy is finally determined in a proper tribunal.

Wherefore said complainant prays that said decree be reversed and said cause be reinstated, and that the defendants be compelled to answer or otherwise plead therein.

Dated 19th Nov., 1900.

JEFFERSON CHANDLER,
VAN NESS & REDMAN,
SHIRLEY C. WARD, AND
J. W. SWANWICK,
Solicitors for Complainant.

41 (Endorsed:) 4. Original. In the circuit court of the United States, in and for the ninth circuit, southern district of California, northern division. Pacific Land and Improvement Co. (a corporation), complainant *vs.* Elwood Oil Company (a corporation), *et al.*, defendants. Assignment of errors. Filed November 21, 1900. Wm. M. Van Dyke, clerk. Harris & Swanwick, attorneys and counselors at law, 402–403 Bullard block, Los Angeles California.

At a stated term, to wit, the July term, A. D. 1900, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, southern division, held at the court-room in the city of Los Angeles, on Wednesday, the twenty-first day of November, in the year of our Lord, one thousand nine hundred.

Present: The Honorable Erskine M. Ross, circuit judge.

Northern Division.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Complainant,
vs.
ELWOOD OIL COMPANY (a Corporation), BAKERSFIELD AND Fresno Oil Company (a Corporation), Kern River Oil Company (a Corporation), Black Jack Oil Company
42 (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants. } No. 4.

Order Allowing Appeal and Fixing Amount of Bond.

On motion of J. W. Swanwick, Esq., of counsel for said complainant, it is ordered that the appeal of said Pacific Land and Improvement Company, a corporation, complainant, from the decree made, entered and recorded on the 26th day of September, 1900, in the above-entitled cause, dismissing complainant's bill at its cost, to the United States circuit court of appeals, for the ninth circuit, be, and the same hereby is allowed, and that a transcript of the record, opinion of the court, assignment of errors, and of all proceedings and papers upon which said decree was made, duly authenticated under the hand of the clerk and the seal of this court, be sent to the United States circuit court of appeals, for the ninth circuit, at San Francisco, California.

It is further ordered that the amount of complainant's bond on such appeal be, and the same hereby is, fixed in the sum of three hundred (300) dollars.

43 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Northern Division. In Equity.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Complainant,
vs.
ELWOOD OIL COMPANY (a Corporation), BAKERSFIELD and Fresno Oil Company (a Corporation), Kern River Oil Company (a Corporation), Black Jack Oil Company (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants. } No. 4.

Bond on Appeal.

Know all men by these presents, that we, The Pacific Land and Improvement Company, a corporation, as principal, and The American Bonding and Trust Company of Baltimore City, Maryland, a corporation, as surety, are held and firmly bound unto the defendants above

named, in the full and just sum of three hundred dollars ($300),
lawful money of the United States, for the payment of which,
44 well and truly to be made, we bind ourselves and our successors and assigns, firmly, by these presents.

Witness the hand and seal of the corporations this 21st day of November, 1900.

Whereas, upon the 26th day of September, 1900, a decree was duly made and entered by the above-entitled court, in the above-entitled action, dismissing complainant's bill of complaint herein, and decreeing that defendants herein have and recover of and from complainant their costs and disbursements therein taxed at the sum of $51.80; and

Whereas, upon the 21st day of November, 1900, complainant above named filed its petition for appeal herein, to the United States circuit court of appeals, for the ninth circuit; and

Whereas, upon said 21st day of November, 1900, said court duly entered an order herein, allowing said appeal, and fixing complainant's bond on appeal in the sum of three hundred dollars; and

Whereas the approval of said bond will operate as a stay of execution herein:

Now, therefore, the condition of the above obligation is such that if the said Pacific Land and Improvement Company shall prosecute said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its said plea good, including the payment of said sum of $51.80 costs, then this obligation to be void; otherwise to remain in full force and effect.

45 In witness whereof the principal and surety above named have caused their corporate names and seals to be hereunto affixed this 21st day of November, 1900.

THE PACIFIC LAND AND IMPROVEMENT COMPANY,
By FRED ZUCKER, *Vice President.*

Attest: FRANK D. LEWIS, *Secretary.*

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, MARYLAND,
By E. T. DUNNING, *Vice-President.*

{ Seal of the American Bonding & Trust Company of Baltimore City, Maryland. }

Attest: H. J. FLEISHMAN,
Assistant Secretary.

(Endorsed:) 4. Original. United States of America, circuit court of the United States, ninth judicial circuit, southern district of California, northern division. Pacific Land and Improvement Company (a corporation), complainant, *vs.* Elwood Oil Company *et al.*, defendants. Bond on appeal. The within bond is hereby approved. Ross, circuit judge. Dec. 13, 1900. Filed Decem-

ber 13, 1900. Wm. M. Van Dyke, clerk. Harris & Swanwick, attorneys and counselors at law, 402–403 Bullard block, Los Angeles, California.

46 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, Northern Division.

PACIFIC LAND AND IMPROVEMENT COMPANY (a Corporation), Complainant,
vs.
ELWOOD OIL COMPANY (a Corporation), BAKERSFIELD and Fresno Oil Company (a Corporation), Kern River Oil Company (a Corporation), Black Jack Oil Company (a Corporation), John Doe, James Doe, William Doe, Henry Doe, Samuel Doe, Richard Roe, James Roe, Henry Roe, and Samuel Roe, Defendants. } No. 4.

Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States of America of the ninth judicial circuit, in and for the southern district of California, do hereby certify the foregoing 89 typewritten pages, numbered from 1 to 89, inclusive, and comprised in one volume, to be a full, true, and correct copy of the record, opinion of the court, assignment of errors and of all proceedings and
47 papers upon which the decree in the above and therein entitled cause was made, and that the same together constitute the transcript of the record on appeal to the United States circuit court of appeals for the ninth circuit in said cause. I do further certify that the cost of the foregoing record is $59.50, the amount whereof has been paid me by Pacific Land and Improvement Company, a corporation, the appellant in said cause.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court of the United States of America of the ninth judicial circuit, in and for the southern district of California, this 18th day of December, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

(Ten-cent U. S. int. rev. stamp. Canceled.)

(Endorsed:) No. 672. In the United States circuit court of appeals, ninth circuit. Pacific Land and Improvement Company, appellant, *vs.* Elwood Oil Company *et al.*, appellees. Transcript of record on appeal. Appeal from the circuit court of the United States for the southern district of California. Filed December 20, 1900. F. D. Monckton, clerk.

48 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE PACIFIC LAND & IMPROVEMENT COMPANY, a Corporation, Appellant,
v.
THE ELWOOD OIL COMPANY, a Corporation, ET AL., Appellees. } No. 672.

COSMOS EXPLORATION COMPANY, a Corporation, Appellant,
v.
GRAY EAGLE OIL COMPANY, a Corporation, ET AL., Appellees. } No. 671.

The bill of complaint in The Pacific Land & Improvement Company *v.* The Elwood Oil Company alleges, in substance, *that* the selection by complainant's predecessor in interest, one J. R. Johnston, on the 23d day of December, 1899, under the act of Congress of June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes," of the E. ½ of the S. W. ¼ of section 4 in township 29 south, range 38 east, M. D. B. & M., containing 80 acres of land and no more, in lieu of a tract of 80 acres of non-mineral land included within the limits of a public forest reservation, for which the United
49 States has issued to him a patent, and which the said Johnston on December 20, 1899, under and pursuant to the provisions of said act of June 4, 1897, relinquished to the United States by deed of conveyance recorded in the office of the county recorder of the county in which said tract is situated, which Johnston delivered at the time of his lieu selection on the 23d day of December, 1899, to the register and receiver of the land office at Visalia, California, within which the selected land is situate, which deed, endorsed as recorded as aforesaid, the said Johnston at the said time filed in said local land office, together with a full and correct abstract of his title to the relinquished tract, duly certified as such by the county recorder of the county in which the tract is situated, showing him to be the owner thereof in fee, free from any incumbrance at the time of such relinquishment, together with his non-mineral affidavit, and together with his selection of the east half of the southwest quarter of said section four, in lieu of the tract relinquished; that on the said 23d day of December, 1899, said register and receiver duly accepted and filed said deed, abstract of title, non-mineral affidavit and selection of the said Johnston and duly entered such selection upon the official records of his office; that the register did then and there certify that the tract so selected by the said Johnston was free from conflict; that there was no adverse filing, entry or claim thereto; that the selected lands were, at the time of selection, unappropriated, vacant public lands of the United States, open to settlement and returned by the

surveyor general as agricultural in character; that such lands, when selected, did not contain any known minerals or known petroleum or known mineral oils; that no mineral, petroleum or known mineral oil, or mineral substance of any kind, had ever been discovered within the limits thereof;
50 that on April 11, 1900, Johnston conveyed the tract so selected, and all his right, title, and interest therein to the complainant, who has ever since been the owner thereof; that the defendants based their claim to the tract in controversy upon a certain pretended placer mining location covering the southwest quarter of said section four, alleged to have been made on June 11, 1899, under the mining laws of the United States by eight named persons, whose interests the defendants claimed to have acquired by mesne conveyances; that said location was void for the reason that no discovery of oil or other mineral was made within its limits until after the selection by said Johnston as aforesaid; that after the lands in controversy were selected by said Johnston, certain of the defendants filed in the local land office at Visalia a written verified protest against such selection, wherein it was alleged that said lands were not subject to selection under said act, for the reason that the same was mineral land and was included within the boundaries of a valid placer location; that said protest prayed that the Commissioner of the General Land Office order a hearing to determine the mineral character of said lands, and that the selection thereof made by said Johnston be rejected; that said protest is pending before the Commissioner of the General Land Office; that the same is insufficient to justify a hearing being ordered by the Land Department to determine the character of said land or to change its classification as fixed by the report of the surveyor general, for the reason that the same does not show that there was any known mine or any known salines or any known or existing petroleum wells or known petroleum deposits on the selected land at the time of its selection, showing the same to be more valuable for mining than agricultural or other purposes; that notwithstanding Johnston acquired the complete equitable title to the land in
51 controversy by his selection thereof and notwithstanding that he was entitled to the complete and uninterrupted enjoyment and possession of the same, the defendants, against the will of the said Johnston, knowing that said land had been selected by him under the act of Congress aforesaid, and knowing his rights in the premises, without any right in themselves or any of them, did, on or about the 6th day of January, 1900, by themselves and their employees, without right and wrongfully and unlawfully, and without the knowledge or consent of said Johnston, and in disregard of his rights, enter upon and became possessed of the lands in question, and erected a derrick and other machinery thereon and proceeded to excavate the soil thereof and to bore a well therein, seeking for petroleum oil therein, for the purpose of taking the same, if found, to their own use and removing the same; that afterward, about the last of January, 1900, the defendants found in said well petroleum

oil in profitable quantities, and that they are engaged in wrongfully and unlawfully pumping large quantities of oil from said well and removing the same from said lands and selling and disposing of and marketing the same, and appropriating the proceeds thereof to their own use, and will continue to do so to the great waste and irreparable injury of said premises, unless restrained therefrom by order of injunction, and that unless restrained by order of the court the defendants will bore other wells upon said premises, and if successful in obtaining petroleum therein, will take such petroleum therefrom and market the same for their own use and benefit, and that complainant has no complete or adequate legal remedy against the wrongs complained of.

The prayer of the bill is for a temporary injunction, restraining the defendants from further boring of wells upon the premises and the further removing of oil therefrom, and that upon the
52 final hearing such injunction be made perpetual; it also asks a decree adjudging that complainant has the full, complete and equitable title to the premises; that the adverse claims of the defendants thereto are wholly without right and unfounded; that a receiver be appointed to take possession of the property and preserve the same and the products thereof until the further order of the court; and for such other relief as may be proper in the premises.

The act of Congress of June 4, 1897, before referred to, contains, among other things, the following provisions: "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. 36.

To this bill of complaint the defendant interposed a demurrer upon the grounds (1) "That enough does not appear upon the face of the bill to show this court's jurisdiction of the subject-matter of the suit; (2) that complainant has not, by its said bill, stated any cause entitling it to any relief against the defendants or either of them; (3) that the said bill is altogether multifarious; (4) that it appeareth by the plaintiff's own showing, by the said bill, that it is not entitled to the relief prayed by the bill against these defendants or either, or of any of them, nor to any relief against these
53 defendants, or either of them or any of them," and prays the judgment of the court whether they or either of them should be compelled to make any answer to the said bill.

Shirley C. Ward, Jefferson Chandler, and J. W. Swanwick, for appellants; John H. Mitchell, John M. Thurston, and T. C. Van Ness, of counsel.

Frank H. Short, J. S. Chapman and C. Linkenbach, for defendants; George W. Baker, of counsel.

Before Gilbert and Morrow, circuit judges, and Hawley, district judge.

HAWLEY, district judge, after stating the foregoing facts, delivered the opinion of the court.

The legal questions involved in these cases on appeal are identical. The facts are substantially the same. There are no differences between them so far as the demurrer to the bill is concerned, except in two particulars. The demurrer in the Pacific Land & Improvement case makes as one of its objections to the bill that it is multifarious. No such objection is urged against the bill in the Cosmos Exploration case. In the Pacific Land & Improvement case there was no amended application made in the land office; it stands upon the single application made on the 23d day of December, 1899. Following the course adopted by appellant's counsel we shall confine the discussion to the Pacific Land & Improvement case, because, as was said by the court below, "these cases were
54 heard together and may be so considered and determined, as the principal questions involved are common to them both."

Upon the filing of the bill the court made an order requiring defendants to show cause, if any they had, why a preliminary injunction should not be granted as prayed for. The defendants appeared and interposed a demurrer to the bill. Upon the hearing of the rule to show cause a large number of affidavits were presented by both sides. The defendants in the meantime had answered the bill and their answers were used as affidavits upon the hearing of the rule to show cause. The demurrer was argued at the same time and submitted. Thereafter the court rendered its decision and decree on September 24, 1900, "that the application for a receiver and for an injunction be and the same hereby is denied; that the demurrer be and hereby is sustained, and that the bill of complaint be dismissed at complainant's costs;" and on September 26, entered its regular decree dismissing the bill. This appeal is taken only from the order and decree sustaining the demurrer and dismissing the bill. The discussion of these questions will be confined to the facts alleged in the bill.

Did the court err in sustaining the demurrer? Did it err in dismissing the bill? Does it appear upon the face of the bill that the circuit court had jurisdiction of the parties and the subject-matter of the suit? The contentions of the respective parties are clearly outlined by the several allegations contained in the bill of complaint, and the first and most important question that arises herein is whether or not appellant has, by such averments "stated itself out of court." This is the vital point upon which the merits of this case, in so far as the demurrer is concerned, hinges.

The demurrer interposed by defendants, questions the juris-
55 diction of the circuit court. We are of opinion that the Federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land to which the title remains in the Government of the United States in regard to which, as shown by the averments in the present bill, a contest between the parties is pending in the Land Department of the Government.

In Savage *v.* Worsham, 104 Fed. 18, Judge Ross said: "It would seem from the bill that the title to the land in question is still in the United States, and that the contest between complainant and respondent in respect to it is yet pending in the Land Department. If so, it is clear that the suit cannot be maintained. 'After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds may be enforced, but not before.' Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley *v.* Cowan, 91 U. S. 330, 23 L. Ed. 424; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. Ed. 800." Humberd *v.* Avery, 110 Fed. 465, 471.

An action of ejectment cannot be maintained in the courts of the United States on a merely equitable title. Frost *v.* Spitley, 121 U. S. 552, 556; Carter *v.* Ruddy, 166 U. S. 493, 496, and authorities there cited.

The averments in the bill,—by whatever name it may be called,—are susceptible of the construction that the defendants are in possession of the land in controversy. "It is true," as was said by Wellborn, J., in California Oil & Gas Company *v.* Miller, 96 Fed. 12, 23, "that the bill does not, in terms, allege that the defendants
are in possession, but the acts charged against the defendants
56 are such as necessarily imply actual possession or occupancy of the land." While such a bill might be maintained under the State law, it is not cognizable by a Federal court of equity, the remedy being at law.

In Erskine *v.* Forest Oil Co., 80 Fed. 583, 585, Buffington, J., in discussing this question, said: "While the bill does not, in words, pray to acquire possession of the wells, yet in substance and effect that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil, and these acts are, where oil and gas are concerned, the essential attributes of possession. The supreme court of Pennsylvania, in the case of Gas Co. *v.* De Witt, 130 Pa. St. 250, 18 AtL. 724, after discussing the peculiar character of gas and oil and their production, say: 'The one who controls the gas (the subject-matter of the case before it)—has it in his grasp, so to speak—is the one who has possession in the legal as well as in the ordinary sense of the word.' A bill, then, which in substance would deprive one in possession of everything which constitutes possession, whatever it is in name, is in fact one to divest possession, or what is known as an 'ejectment bill' * * * In the Federal courts the line between law and equity, and consequently between legal and equitable rights and remedies, has been sharply defined and strictly observed. The provision of the constitution vesting judicial powers

'in cases in law and equity * * * between citizens of different States' recognizes the distinction. A constitutional amendment insures the right of trial by jury 'in suits at common law when the value in controversy shall exceed twenty dollars,' and the sixteenth section of the judiciary act of 1789 provides 'that suits in equity shall not be sustained in either of the courts of the United States
57 in any case where plain, adequate, and complete remedy may be had at law.' And to such length have these provisions been extended that it has been held (Allen *v.* Car Co. 139 U. S. 662, 11 Sup. Ct. 682): 'If the court in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel.' And rightly so, for we are here dealing with the constitutional right of the citizen, and, as was said by Mr. Justice Campbell in Hipp *v.* Babin, 19 How. 278, 'Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. * * * After careful consideration, we are of opinion complainant's title is wholly a legal one, that ample remedy exists at law, that there are no special facts or circumstances in this case calling for the exercise of equitable jurisdiction, and that the bill is an ejectment one. With a disposition on our part to, if possible, retain jurisdiction to dispose of the case by construing the will, and end the controversy between the parties, we are unable to do so. The cases of Hipp *v.* Babin, 19 How. 278, Whitehead *v.* Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, and others that might be referred to, block the way to a Federal court assuming jurisdiction of what is in substance and real purpose an ejectment bill."

In Whitehead *v.* Shattuck, 138 U. S. 146, the bill of complaint, among other things, alleged that notwithstanding complain-
58 ant's ownership of the property and his right to its immediate possession and enjoyment, the defendants claimed title to it and were in its possession, holding the same, openly and adversely to him; that their claim of title was without foundation in law or at equity; and that it was made in fraud of the rights of the plaintiff. To this bill the defendants demurred on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy and adequate remedy at law, by ejectment, to recover the real property described, and that it showed no ground for equitable relief. The demurrer was sustained. In the course of the opinion the court said: "The code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession,' implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that State. * * * If that be its meaning, an action like the present

can be maintained in the courts of that State, where equitable and legal remedies are enforced by the same system of procedure, and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the State courts; but the law of that State cannot control the proceedings in the Federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

59 The opinion in that case was written by Mr. Justice Field who also wrote the opinion in Holland *v.* Challen, 110 U. S. 15, relied upon by appellant, and he explains and distinguishes that case from the one under consideration.

In Black *v.* Johnson, 177 U. S. 349, 361, the court, in discussing similar questions, quotes with approval the language of the court in Lacassagne *v.* Chapuis, 144 U. S. 119, 124, as follows: "The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. * * * The plaintiff has a full, adequate and complete remedy at law, and the case is not one for the jurisdiction of a court of equity." See also, Gordon *v.* Jackson, 72 Fed. 86; Randolph *v.* Allen, 73 Fed. 23, 30; Grether *v.* Wright, 75 Fed. 742, 748; Childs *v.* Carlstein Co., 76 Fed. 86, 95; Davidson *v.* Calkins, 92 Fed. 230, 232, and authorities there cited; Morrison *v.* Marker, 93 Fed. 692, 695, and authorities there cited; Hanley *v.* Kansas T. Coal Co., 110 Fed. 62, 69.

We are of opinion that the circuit court had no jurisdiction to try the title to the property, or to adjudge the complainant to be entitled to the possession thereof.

Appellant's counsel claim that the bill was framed upon the theory that the controversy of the parties before the Land

60 Department turned solely upon a pure question of law to be finally determined by the court, and did not, and does not, involve any question of fact over which the Land Department had, or has, exclusive jurisdiction. But in any event, if the court should hold that it had no jurisdiction to try the title between the parties, or to enter a decree for the possession thereof as prayed for in the bill, it nevertheless has jurisdiction and should have entertained the bill in so far as it asked for an injunction to preserve the *statu quo* pending the determination of the controversy between the parties in the Land Department. The general disposition of the courts is to retain jurisdiction of any subject where there is any plausible ground of equitable cognizance, (Waite *v.* O'Neil, 72 Fed. 348, 356; Randolph *v.* Allen, 73 Fed. 23, 30; Grether *v.* Wright, 75 Fed. 742, 749; Greeley *v.* Lowe, 155 U. S. 58, 75), especially where

such jurisdiction would not infringe upon the constitutional rights of the parties by a trial by jury.

Does the bill of complaint, from any legal or equitable standpoint, state facts sufficient to show that complainant is entitled to any relief?

It will be observed from the allegations contained in the bill that the pleader did not confine himself to a statement of the facts, but interjected therein his construction and conclusion not only as to the facts, and the meaning of the act of Congress of June 4, 1897, but also his views in regard to the legal principles applicable thereto.

While the rule is well settled that in considering the points raised by a demurrer the facts stated in the bill must be
61 treated as true, it does not by any means follow that the conclusions of counsel as to the law must likewise be accepted as correct. It is the duty of the court to determine the principles of law applicable to the facts stated in the bill.

The act of June 4, 1897, is the measure of appellant's rights and of its duties. By the averments in its bill of complaint has it brought itself within the requirements of the law?

A person making selections of land under the provisions of the act of Congress of June 4, 1897, must relinquish to the Government the tract in the forest reservation, and submit satisfactory evidence respecting the title thereto, and must make selection of the tract desired in exchange for the tract of land relinquished, and accompany his selection by proof showing the selected land to be of the condition and character making it subject to selection. These are the essential requirements of the act.

The principal contentions of the respective parties, in their briefs and upon the oral arguments, may be briefly stated as follows: On the part of appellant (1), that lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the Land Office records, unless, at the date of selection, they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes; (2) that defendants' mining locations are void because no discovery of petroleum had been made at the time of the location, nor until after the lands had been selected by appellant's grantor, and that, notwithstanding the mining loca-
62 tions of appellees, the land was vacant and open to settlement at the time it was selected by Johnston; (3) that the equitable title to lands selected in lieu of patented lands relinquished, vests at the date of selection and cannot be impaired by subsequent mineral discoveries in the land.

On the part of appellees (1) that lands are vacant and open to settlement, and therefore subject to selection under said act, only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character; (2) that lands selected under said act in lieu of relinquished forest-reserve lands, covered by patent, remain open to exploration under the mining laws until the approval of the selection by the Land Department, and if at any time after the selection and before its approval the selected land is

discovered to contain valuable mineral deposits, its mineral character will be thereby established and the selection defeated.

In the homestead and pre-emption cases questions have frequently arisen as to the known character of the land at the date of the cash entry—and it has been generally held that if the land was then known to be mineral land—chiefly valuable for its mineral contents, or more valuable for mining than agricultural purposes—it is not subject to entry. If no such facts as to the mineral character of the land are shown to exist, the pre-emptioner or homesteader, if he is possessed of the necessary qualifications and has fully complied with the pre-emption or homestead laws, as the case may be, at the time of his cash entry, is entitled to the land.

The general rule is well settled that the right to a patent once vested is treated by the Government in dealing with
63 the public lands, as equivalent to a patent issued, and when the patent does issue it relates back to the inception of the right of the patentee. Carroll *v.* Safford, 3 How. 441; U. S. *v.* Hughes, 11 How. 552, 568; French *v.* Spenser, 21 How. 228; Hughes *v.* U. S., 4 Wall. 232; Stark *v.* Starrs, 6 Wall. 402, 414; Wirth *v.* Branson, 98 U. S. 118, 121; Simmons *v.* Wagner, 101 U. S. 260, 261; Deffebeck *v.* Hawke, 115 U. S. 392; Davis' Adm'rs *v.* Weibold, 139 U. S. 507, 528; Hedrick *v.* Railroad Co., 167 U. S. 673, 679.

The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of Congress, have the force and effect of laws. The regulations of the Commissioner, relative to lieu-land selections under the act of June 4, 1897, (prescribed June 30, 1897), are, in our opinion, reasonable and evidently were intended, and are well calculated, to carry into effect the intent and true meaning of the act of Congress. They are properly within the limitations of the law for the enforcement of which they were promulgated, and should be complied with. Anchor *v.* Howe, 50 Fed. 366; Germania Iron Co. *v.* James, 80 Fed. 811, 814; Hoover *v.* Salling, 102 Fed. 716, 720; Poppe *v.* Athearn, 42 Cal. 606, 609; Chapman *v.* Quinn, 56 Cal. 266, 273.

We understand it to be, virtually, admitted that the party making an exchange of land under the forest-reserve act, like any other entryman upon the public lands of the United States, only secures a vested interest in the lands which he has selected in exchange for, or in lieu of, the lands relinquished by him, when he lawfully en-
ters upon the same and in all respects complies with the re-
64 quirements of the law under which he claims his rights. This general principle is too well settled to require any elaborate discussion. It has been so decided by this court in American Mortgage Co. *v.* Hopper, 64 Fed. 553, 555; Diller *v.* Hawley, 81 Fed. 651, 653. The latter case was taken to the Supreme Court of the United States and was there affirmed. 178 U. S. 476.

As illustrative, and decisive, of many of the questions discussed by counsel, we quote from Michigan Land and Lumber Company *v.* Rust, 168 U. S., 589, 592. "Generally speaking, while the legal title remains in the United States, the grant is in process of administra-

tion and the land is subject to the jurisdiction of the Land Department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother *v.* Lucas, 12 Pet. 410, 454; Grignon's Lessee *v.* Astor, 2 How. 319; Chouteau *v.* Eckhart, 2 How. 344, 372; Glasgow *v.* Hortiz, 1 Black, 595; Langdeau *v.* Hanes, 21 Wall. 521; Ryan *v.* Carter, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. sec. 2449; Frasher *v.* O'Connor, 115 U. S. 102; but whenever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, Bagnell *v.* Broderick, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the Land Department is not lost. It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has juris-
65 diction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. Cornelius *v.* Kessel, 128 U. S. 456; Orchard *v.* Alexander, 157 U. S. 372, 383; Parsons *v.* Venzke, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' Miller *v.* Kerr, 7 Wheat. 1, 6. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. United States *v.* Stone, 2 Wall. 525, 535; Moore *v.* Robbins, 96 U. S. 530; United States *v.* Schurz, 102 U. S. 378, 396; Bicknell *v.* Comstock, 113 U. S. 149, 151; Iron Silver Mining Company *v.* Campbell, 135 U. S. 286; Williams *v.* United States, 138 U. S. 514. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase-money has been paid and a receiver's final certificate issued. Orchard *v.* Alexander, 157 U. S. 372, and cases cited in the opinion; Parsons *v.* Venzke, 164 U. S. 89." See also, Knight *v.* United States Land Association, 142 U. S. 161; Hawley *v.* Diller, 178 U. S. 476.

Referring to the provisions of the act of June 4, 1897, upon which the right of appellant is founded, we find it there stated that the party relinquishing his forest-reserve land "may select in lieu thereof a tract of vacant land open to settlement." He cannot select in lieu thereof any tract of public land that is not vacant nor open to settlement.

The bill of complaint alleges a full compliance on behalf of appellant's grantor, Johnston, with all the provisions of the
66 statute and further alleges that defendants controvert this proposition and "base their rights in and title to the premises" upon a certain pretended placer mining location, covering the south-

west quarter, alleged to have been made upon the 11th day of June, 1899, under the mining laws of the United States by parties under whom the defendants claim to have acquired title by mesne conveyance, and then alleges that these alleged placer mining locations were and are irregular and void because the same were not based upon any discovery of mineral or oil thereon, and that in fact no discovery of oil was made thereon until after the said land was selected by said Johnston under the act of Congress, and that since said land was selected by Johnston the defendants have entered thereupon, bored for and obtained petroleum thereon, and are now engaged in marketing the same therefrom.

It will be noticed that these locations were made over six months prior to the date of selection under the forest-reserve act by the grantor of appellant.

What is the meaning of the words "vacant lands open to settlement" used in the act with reference to the facts as alleged in the bill? The ordinary meaning of the word "vacant," in its general use, is to be empty, or unfilled. When applied to an office it means the condition when it is first created and not filled by any incumbent, or after the death or removal of an incumbent before his successor is appointed. Vacant lands are such as are absolutely free, unclaimed and unoccupied. "The word 'vacant' when applied to lands means those which have not been appropriated by individuals." Marshal *v.* Bompart, 18 Mo. 84, 87.

Under the wise and beneficent policy of the Government of the United States all its public lands were thrown open to its citizens, and those who had declared their intention to become such,
67 for exploration for the precious minerals and development thereof.

"SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

The grantors of defendants at the invitation of the Government, and assurance of protection from it, and believing that the lands in question contained oil, lawfully entered thereon and made locations of twenty-acre tracts as they were authorized to do by the laws of the United States and commenced to search for oil.

Chap. 216, 29 Stat., 526, reads as follows: "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: Provided, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this

act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof."

From the allegations of the bill, it appears that at the time of appellants' selection of the lands in question, no discovery of any
68 mineral had been made. Appellees could not, at that time, have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose; but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it cannot, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time because it was then occupied by the defendants' grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States.

It is true that no valid location of a mining claim can be made, under the mining laws, until the discovery of mineral. Sec. 2320 of the Rev. Stat. expressly provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." It does not, however, follow that because no mineral was found, the land in question was unoccupied. It is true, as was held in Garthe *v.* Hart, 73 Cal. 541, that the mere possession of a piece of mining ground is only good as against an intruder, but not as against one who subsequently located the same in compliance with the mining laws. The same principle was announced in Crossman *v.* Pendery, 8 Fed. 693, but Miller, justice, in the course of his opinion, said: "A prospector on the public mineral domain may protect himself in the possession of his *pedis possessio* while he is searching for mineral. His possession, so held, is good as a possessory title against all the world, except the Government of the United States."

The location of a mining claim is but one step toward the acquirement of a title thereto. As a matter of fact the location
69 is seldom the first act. It is sometimes the last step taken. As was said in Erwin *v.* Perego, 93 Fed. 608, 611, "The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. Jupiter Min. Co. *v.* Bodie Consolidated Min. Co., 11 Fed. 666, 676; 4 Morr. Min. R., 411, 423; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 531; Zollars *v.* Evans, 5 Fed. 172, 175; Stepy *v.* Stark (Colo. Sup.) 5 Pac. 111, 114; Thompson *v.* Spray, 72 Cal. 528, 533, 14 Pac. 182; Erhardt *v.* Boaro, 113 U. S. 527, 536."

But, whatever his rights may be, the fact that the miner is in the actual possession without having made any location at all shows that the land is not "vacant."

Prior to the passage of the acts of Congress for the disposition of

the mineral lands, it was expressly held that when a notice was posted and the boundaries marked, possession extended to the entire limits although the location was not made in the manner prescribed by local rules. Atwood *v.* Fricot, 17 Cal. 37; English *v.* Johnson, 17 Cal. 107.

Since the enactment by Congress of the laws for the disposition of the public mineral lands the same doctrine has been applied. Field *v.* Grey, 1 Ariz. 404; Lincoln-Lucky & Lee M. Co. *v.* Hendry, 50 Pac. 330.

The fact that defendants under their mining locations had not, at the time of Johnston's selection of the land as agricultural, discovered any petroleum, that being the mineral for which their locations were made, shows that they had not perfected their locations, under the mining laws; that their absolute right to the exclu-
70 sive possession of the ground covered by their locations, as against the Government of the United States, had not accrued to them, and the Government might, if it had seen fit to do so, have terminated the license theretofore given to them to occupy the land, and Congress might have granted the land to others. But under the act of June 4, 1897, it will be observed that Congress did not grant the right under the forest-reserve act to select any lands unless they were vacant. It therefore necessarily follows that, if the land was not vacant and open to settlement, Johnston did not acquire any title to the lands in question. He was, in the eye of the law, a trespasser, because so far as that act is concerned the lands were excepted from such selection, and by attempting to make such selection he was a mere intruder and his grantee is not in a position to question the validity of the defendants' locations.

From the averments contained in the bill we cannot agree with the poetic fancy of the learned counsel for appellant that this land, at the time of Johns-on's entry, "lay under the sunshine of God, just as denuded of possession as it was on the dawn of the primal morning."

In Tarpey *v.* Madsen, 178 U. S. 215, 221, the court, in discussing a similar question, with reference to the occupancy of public land by parties whose claims rested on no statute and upon no other right than the general recognition by the Government in its disposition to protect actual settlers, said: "It must be remembered that mere occupation of the public lands gives no right as against the Government. It is a matter of common knowledge that many go on the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of
71 stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale. Lamb *v.* Davenport, 18 Wall. 307."

In Shaw *v.* Kellog, 170 U. S. 312, 332, the court discussed many questions which are directly applicable to the present case. The facts in relation to the selection of lands were very similar to the act under consideration. The court, in reference to the subject we are now considering, said: "The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant."

In Kern Oil Co. *v.* Clarke, 30 L. D. 550, 555, the Secretary of the Interior, among other things, said: "The act in question contains an offer by the Government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the Government and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise."

72 The contention of appellant, that the act of Congress has reference only to vacant land open to settlement which appears upon the books of the Land Department, cannot be sustained. In the brief of appellant, counsel say: "It is respectfully and confidently submitted that this word 'vacant' has never been held to apply merely to 'unoccupied public lands,' but to all public lands which the records of the land office show are unreserved and unappropriated, whether actually occupied or not. In other words, the term 'vacant lands' in General Land Office parlance, from time immemorial, has meant simply this: Those public lands which are unreserved and unappropriated, as shown by the records of the General Land Office."

Some of the richest mineral lands in the United States which have been owned, occupied and developed by individuals and corporations for many years have never been patented. It would be absurd to say that such lands were vacant and open to settlement because the books of the Land Department do not show that they have been settled upon. The possessory rights of the miners have always been recognized by law, although in all such cases the legal title to the land remains in the Government.

In Forbes *v.* Gracey, 94 U. S. 762, the court, in relation to the subject we are discussing, in the course of its opinion, said: "Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the Government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for

the land. It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims." (Rev. Stat. secs. 2318–2352.)

73 In Kern Oil Co. *v.* Clarke, *supra*, Secretary Hitchcock in discussing this subject said: "The statute authorizes selection only of 'vacant land open to settlement.' To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to — valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land-office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the Government can and must take notice of the public records. But as to conditions, the existence or non-existence of which cannot be determined by anything appearing upon the public records and as to which the officers of the Government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the Government cannot be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. * * * Obviously, therefore, it could not have been contemplated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior. Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential

74 conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so whether stripped of their minerals and worked out, are matters not shown by the land-office records."

The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in Atherton *v.* Fowler, 96 U. S. 513, 516, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands; that the right to make improvements, is to be exercised on unimproved land; that the right to erect a dwelling-house is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others.

No right can be initiated on Government land which is in the actual possession of another by a forcible, fraudulent or clandestine

entry thereon. Cowell *v.* Lammers, 21 Fed. 200, 202; Nevada Sierra Oil Co. *v.* Home Oil Co, 98 Fed. 674, 680; Hosmer *v.* Wallace, 97 U. S. 575, 579; Trenouth *v.* San Francisco, 100 U. S. 251; Mower *v.* Fletcher, 116 U. S. 380, 385–'6; Haws *v.* Victoria Copper M. Co., 160 U. S. 303, 317; Nickals *v.* Winn, 17 Nev. 188, 193; McBrown *v.* Morris, 59 Cal. 64, 72; Goodwin *v.* McCabe, 75 Cal. 584, 588; Rourke *v.* McNally, 98 Cal. 291.

The decisions upon this point are not all confined to cases where the entry was forcible, although in such cases the courts did not discuss the question whether the same principles would apply to cases of an entry upon lands in the actual possession of another, without the use of force.

In Quinby *v.* Conlan, 104 U. S. 420, 423, the element of force is not shown to have existed and is not adverted to in the
75 opinion. The court said: "A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a preemptive right. Such is the purport of our decisions in Atherton *v.* Fowler, 96 U. S. 513, and Hosmer *v.* Wallace, 97 *id.* 575."

In Goodwin *v.* McCabe, *supra*, the court said: "If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. * * * The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not."

In Gird *v.* California Oil Co., 60 Fed. 531, 545, this principle is recognized. The court said: "If Irland was in the actual possession, and working the ground for himself, and Bradfield, Henley and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location as made by them would be void, because in that event, the location would have been made upon ground, not vacant and open to location, but upon ground in the actual and adverse occupancy of another."

Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not, at the time of such selection, "vacant land open to settlement," it is unnecessary to review the many other questions which were elaborately argued by the learned counsel.

It necessarily follows, from the views we have expressed, that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The court did not,
76 therefore, err in sustaining the demurrer and dismissing the bill.

It is proper to state that, after the preparation of this opinion, appellant was given permission to present to this court the brief filed in its behalf before the Secretary of the Interior upon its application for a review of its decision in Kern Oil Co. *v.* Clarke, 30 L. D. 550, and Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 30 L. D. 570, wherein, among other things, the question of

the meaning of the words "vacant lands open to settlement," as used in the act of Congress of June 4, 1897, is elaborately discussed. It is enough to say, in reply thereto, that we have examined this brief and the additional authorities therein cited, and deem it unnecessary to further discuss the question.

The judgment of the circuit court in both cases is affirmed, with costs.

Endorsed: "Filed Nov. 15, 1901. F. D. Monckton, clerk."

77 United States Circuit Court of Appeals for the Ninth Circuit.

THE PACIFIC LAND & IMPROVEMENT COMPANY (a Corporation), Appellant,
vs.
THE ELWOOD OIL COMPANY (a Corporation) ET AL., Appellees. } No. 672.

THE COSMOS EXPLORATION COMPANY (a Corporation), Appellant,
vs.
THE GRAY EAGLE OIL COMPANY (a Corporation) ET AL., Appellees. } No. 671.

GILBERT, circuit judge, dissenting:

I agree with the majority of the court that the crucial question of the present cases is whether or not the appellees had such possession or right of possession of the premises in controversy as to take them out of the list of vacant lands open to settlement at the date when the appellant's grantor selected them as lieu lands. Assuming the settled law to be that land is not mineral land on which mineral has not been discovered, and that therefore the premises in question here were not excluded from selection on the ground that they were not agricultural land, the case resolves itself into the inquiry, What was the nature of the right which the appellees had secured prior to December, 1899, when the appellant's grantor made his selection? The bill alleges that in the month of June of that year the appellees had located upon these premises certain placer mining claims. The nature of the act by which such locations were made is not stated. It may be assumed that it con-
78 sisted in marking and establishing the four corners and posting at one of them a notice of the claim. These acts by themselves alone gave no right whatever to the locator. They were not the initiation of a claim nor did they constitute constructive possession. The most that could be claimed for them is that the locations took effect at the date of the discovery of mineral in paying quantity, provided that rights of others had not then intervened. Jupiter Mining Co. *v.* Bodie C. M. Co., 11 Fed. 666. Erwin *v.* Perego, 93 Fed. 608. So far as the present controversy is concerned, therefore, the acts of location made in June, 1899, may be eliminated from the case, for they can have no bearing upon the question under

discussion. According to the allegations of the bill no other act was done by the locators between the date of location and the date of the selection of the land by the appellant's grantor in the following December. The bill charges, however, that after such selection was made the defendants on or about January 6, 1900, entered upon the lands and erected derricks thereon and bored for oil which on or about the last day of January, 1900, they discovered in paying quantity. This is the state of the facts as presented by the bill and by which we must be guided in dealing with the demurrer. I submit that the mere location of a mining claim on land that is not mineral, unaccompanied by other acts, is insufficient to initiate any kind of right to the land, and that land covered by such a claim is as truly vacant land open to settlement as is any other land of the public domain. But the opinion of the majority of the court contains the statement that the appellees were at the time of the selection of these lands as lieu lands "in the occupancy of the land they had located. They claimed it to be mineral and they were diligently
at work to prove it to be such." This statement is based
79 upon the assumption that there must be read into the bill
certain facts which are found in the affidavits filed on behalf of the appellees upon the application which was made for an injunction. I know of no rule of chancery practice which permits us to do this, or to take as proven any allegation that the complainant has not admitted to be true, but if indeed we are authorized to consider the case as if these facts had been incorporated in the bill, I am still of the opinion that the demurrer should have been overruled. What is the nature of the right of a prospector upon the public lands of the United States? It is settled that he is not a trespasser. On the contrary, he is invited to explore and to occupy. By the act of May 10, 1872, all valuable mineral deposits are declared to be free and open for exploration and purchase "and the land in which they are found to occupation and purchase." It will be observed that by the terms of the statute the right to occupy follows the discovery. There is no statutory right of possession or occupation or any other right whatever conferred by any statute prior to discovery, save and except the right of exploration. While permitting the freest exploration, it does not appear to be the purpose of the legislation in regard to the mineral lands of the United States to permit a prospector or an intending locator to initiate any kind of right to such lands prior to a discovery, or to permit him by any act of his prior to discovery to interfere with the appropriation and settlement of lands as agricultural lands under the public land laws or other laws offering such lands to selection or appropriation. All the decisions to which my attention has been directed are reconcilable with this view. The courts have gone no further than to hold that the possession of a prospector may not be interfered with by one who has no bet-
ter right than he. This has been held, not as the con-
80 struction of the mining laws, but upon motives of public
policy to prevent entries by force and violence. One in possession of premises, without right or title, may prevent the intrusion

of another who is equally without right or title solely upon the ground that possession is *prima facie* evidence of title. Atherton *v.* Fowler, 96 U. S. 513; Brandt *v.* Wheaton, 52 Cal. 430; Campbell *v.* Rankin, 99 U. S. 261. It is contended that certain decisions go further than the doctrine above announced and reference is made to the opinion of Mr. Justice Miller in Crossman *v.* Pendery, 8 Fed. 693, and to the language of the Supreme Court in Tarpey *v.* Madsen, 178 U. S. 215. In the first of these cases it was held that a prospector upon the public mineral domain may as against another prospector protect his *pedis possessio* while searching for mineral. The learned justice proceeded to remark: "His possession, so held, is good as a possessory title against all the world, except the Government of the United States." I submit that this language means no more than that such possession is good as against all except those who may initiate a right to the land under the land laws of the United States or who may place themselves in the attitude of acquiring the right or title of the United States. The court in that case was called upon to discuss no question save the relative rights of rival prospectors and the language used is referable only to that controversy. So in Tarpey *v.* Madsen the question before the court was whether one who had actually occupied public land with the intention to make a homestead or pre-emption entry could be defeated by the mere lack of a place where to make a record of his intention. Incidentally the court remarked: "It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply
81 prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale." Clearly this language means no more than that the possession of the public lands which is referred to in the quotation is good as against a stranger. Can it be said that the Supreme Court intended to say that one who enters upon and takes possession of public land for purposes of "hunting or trapping" and with "no thought of acquiring title to the land" acquires a right which he can hold as against an intending settler under the homestead laws? The language is susceptible of no such construction, a construction totally at variance with the trend and policy of all legislation concerning the disposition of the public lands and directly contrary to the provisions of the statute of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands." The true meaning of the language so quoted from the opinion of the court is found in the words of the same court in Sparks *v.* Pierce, 115 U. S. 413, where it was said: "Mere occupancy of the public lands and improvements thereon give no vested right therein

as against the United States and consequently not against any purchaser from them." The appellants in the cases under consideration are purchasers from the United States.

The right to explore for minerals upon the public domain is but a license. It does not, prior to discovery, constitute
82 a legal right in or to the land on which the exploration is made. The attitude of the prospector to the land is not like the entry of a settler under the pre-emption law or like that of any other permitted appropriator of the public lands. He is not required to enter with any intention of ultimately acquiring title, nor does he in fact enter with such intention. His intention must of necessity depend upon the result of his investigation. He may rove over the public lands at will, and may dig and excavate wherever he may choose, provided that he shall not interfere with another who is making like explorations, or trespass upon the lawful possession of another. Until the discovery of the mineral the law gives him no right whatever except to defend himself against the invasion of another who has no greater right. If a prospector while exploring for mineral permit another to enter peaceably upon the same premises and not to explore, there can be no question that the latter if he first discover mineral will acquire the right thereto and the right to locate the claim. Beek *v.* Meagher, 3 Mont. 65; *ib.* 104 U. S. 279. The general nature of the right of the prospector has often been defined by the courts. Said Judge Sawyer in Jupiter Mining Company *v.* Bodie C. M. Co., 11 Fed. 675, "No rights can be acquired under the statute by a location made before the discovery." The circuit court of appeals for the eighth circuit in Erwin *v.* Perego, 98 Fed. 611, speaking of the two essential acts of discovery and location, said: "But when these requirements have been complied with the land is no longer public, but the possession, the right of possession, and the right to acquire the title are irrevocably vested in the locator." There are similar expressions in the decisions of the State courts. "The right of possession comes only from a valid location." Russel *v.* Hoyt, 4 Mont.
83 421. "The mere naked possession of a mining claim is not sufficient to hold such a claim against a subsequent location made in pursuance of law." Hopkins *v.* Noyes, 4 Mont. 556. "Possession is good against mere intruders, but is not good as against one who has complied with the mining laws." Garthe *v.* Hart, 73 Cal. 543.

If it be the law that vacant non-mineral land upon which a prospector is making his explorations is not open to settlement or to selection as lieu land, and that such a prospector by his mere presence or by having dug a hole or erected a derrick acquires the right to retain possession of the land until his explorations shall be finished, what is the limit of his right and where is the halting place? What acts of a prospector shall be sufficient, and what shall not be sufficient, to withdraw such lands from settlement or from selection as agricultural lands? How shall a lieu-land selector or a homestead settler know that a prospector is not or has not recently been digging or otherwise exploring for mineral in

some gulch or canyon of the non-mineral land included in the entry or selection? and how shall he ascertain that exploration once begun has ceased? How extensive an area of the public domain and for how long a period of time may a single prospector so occupy that it shall not be open to settlement or selection? It is no answer to these inquiries to say that the court will not in the present case define the nature of the acts which will constitute such a possessory right but will content itself with the conclusion that the acts set forth in the case at bar are sufficient.

I submit that the decision imports into the statute terms that are not there written and that were not within the intention of Congress,

84 and that by the use of the words "vacant land open to settlement" the intention was to refer the selector of lieu lands to the records of the Land Office and to the condition of the land itself, whether in the open occupation of a settler holding the possession with the avowed intention of acquiring title under the public land laws, and not to leave the question What are vacant lands open to settlement? to be variably answered by the judgments of courts upon the special facts presented in each case.

Endorsed: "Dissenting opinion. Filed November 15, 1901. F. D. Monckton, clerk."

85 United States Circuit Court of Appeals for the Ninth Circuit.

THE PACIFIC LAND & IMPROVEMENT COMPANY, a Corporation, Appellant, *v.* THE ELWOOD OIL COMPANY, a Corporation, *et al.*, Appellant.	No. 672.	Decree.

Appeal from the circuit court of the United States for the southern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of California and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed and entered Nov. 15, 1901, F. D. Monckton, clerk.

86 In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC LAND AND IMPROVEMENT COMPANY, Appellant,
vs.
ELWOOD OIL COMPANY ET AL., Appellees. } No. 672.

Petition on Appeal.

Complainant and appellant above named conceiving itself aggrieved by the decree rendered in the above-entitled cause on November 15th, 1901, and thereafter filed and entered as of that date, does hereby appeal from said decree and order affirming the judgment of the circuit court to the Supreme Court of the United States, for the reasons specified in the assignment of error which is filed herewith; and complainant and appellant prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree and order were made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, November 29 1901.

JEFFERSON CHANDLER,
SHIRLEY C. WARD,
J. A. SWANWICK,
Solicitors for Complainant and Appellant.

JOHN H. MITCHELL,
JOHN M. THURSTON,
T. C. VAN NESS,
Of Counsel.

The foregoing claim of appeal is allowed this 29th day of November 1901. Bond on appeal fixed at $500.00.

WM. W. MORROW,
Circuit Judge.

87 In the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC LAND AND IMPROVEMENT COMPANY,
Appellant,
vs.
ELWOOD OIL COMPANY ET AL., Appellees. } No. 672. In Equity.

Assignment of Error on Appeal.

The appellant, by the undersigned, its solicitors, in connection with its petition on appeal herein, says that the decree in this cause is erroneous in the following particulars:

1. The court erred in holding and deciding that the circuit court had no jurisdiction to try the title to the lands described in the bill

of complaint or to adjudge complainant to be entitled to the possession thereof.

2. The court erred in deciding and holding that the circuit court had no jurisdiction to entertain the bill in so far as it asked for an injunction restraining defendants from taking and removing petroleum from said lands, and erred in holding and deciding that the court had no jurisdiction to preserve the status of said lands pending determination of the controversy between the parties in the Land Department respecting appellant's right to a patent to said lands.

3. The court erred in holding and deciding that vacant lands are such as are absolutely free, unclaimed and unoccupied.

4. The court erred in holding and deciding that the lands described in the bill of complaint were not vacant lands at the time of their selection by complainant's grantor.

88 5. The court erred in holding and deciding that said lands were not at said time open to settlement.

6. The court erred in holding and deciding that defendants' grantors lawfully entered upon said lands and made locations thereon; and erred in holding and deciding that they had a lawful right to be there.

7. The court erred in holding and deciding that defendants or their grantors ever at any time prior to the discovery of petroleum therein claimed said lands or any of them to be mineral lands; and erred in holding and deciding that they or any of them at any time prior to the selection thereof by complainant's grantor were diligently or at all at work to prove said lands or any part thereof to be such.

8. The court erred in holding and deciding that said lands were not vacant and open to settlement at the time of their said selection because they were then occupied by defendants' grantors under a claim and color of right; and erred in holding and deciding that it matters not that they had not at said time acquired any rights against the United States.

9. The court erred in holding and deciding that whatever a miner's rights may be, the fact that he is in the actual possession of land without having made any location at all shows that the land is not vacant.

10. The court erred in holding and deciding that it appears from the bill of complant that said lands were not denuded of possession at the time of their said selection.

11. The court erred in holding and deciding that the words "vacant lands" as used in the act of June 4th, 1897, do not mean those public lands which the records of the land offices show to be unreserved and unappropriated.

12. The court erred in holding and deciding that the bill of complaint does not state any cause of action entitling complainant to any relief against defendants.

89 13. The court erred in holding and deciding that the circuit court did not err in sustaining the demurrer to the bill and dismissing the bill.

14. The court erred in holding and deciding that the lower court did not err in sustaining the first ground of the demurrer interposed by the defendants, and by adjudging and deciding that enough does not appear upon the face of the bill to show that the circuit court had jurisdiction of the subject-matter of the suit.

15. The court erred in holding and deciding that the lower court did not err in sustaining the second ground of the demurrer interposed by defendants, and by adjudging and deciding that complainant did not make or state any cause of action in said bill sufficient to entitle it to any relief as is therein sought and prayed for from and against defendants.

16. The court erred in holding and deciding that the lower court did not err in sustaining the third ground of the demurrer interposed by defendants, and by adjudging and deciding that the bill of complaint is multifarious.

17. The court erred in holding and deciding that the lower court did not err in dismissing said bill, because it appears from said bill that the complainant is the equitable owner of the lands in controversy, and that none of the defendants have any rights therein, and that the injury complained of is irreparable in its nature.

18. The court erred in holding and deciding that the circuit court did not err in dismissing said bill, because from the allegations thereof it appears that complainant is entitled to equitable relief by injunction restraining defendants from continuing commission of the acts of waste alleged in said bill of complaint until such time as the title to the premises in controversy is finally deter-
90 mined by the proper tribunal.

19. The court erred in holding and deciding that the circuit court did not err in dismissing said bill, because it appears from the allegations thereof that said lands were, at the time of their selection by complainant's grantor, vacant lands open to settlement, and that thereafter defendants and those under whom they claim entered upon said lands and took possession thereof against the will and protest of complainant and its grantor.

Wherefore, complainant and appellant prays that the decree and order herein appealed from be reversed, and that the circuit court be directed to overrule defendants' demurrer and to proceed with the action.

JEFFERSON CHANDLER,
SHIRLEY C. WARD,
J. W. SWANWICK,
Solicitors for Appellant.

JOHN H. MITCHELL,
JOHN M. THURSTON,
T. C. VAN NESS,
Of Counsel.

(Endorsed:) Petition on appeal and order allowing same and assignment of errors. Filed November 29, 1901, F. D. Monckton, clerk.

91 Know all men by these presents: That we, The Pacific Land & Improvement Company, a corporation organized and existing under the laws of the State of Nevada, and doing business in the State of California, as principal, and Edwin A. Meserve and T. C. Van Ness as sureties, are held and firmly bound unto the Elwood Oil Company, a corporation, Bakersfield & Fresno Oil Company, a corporation, Kern River Oil Company, a corporation, and the Black Jack Oil Company, a corporation, in the full and just sum of five hundred ($500.00) dollars, to be paid to said Elwood Oil Company, a corporation, Bakersfield & Fresno Oil Company, a corporation, Kern River Oil Company, a corporation, and Black Jack Oil Company, a corporation, or their attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this the second day of December, in the year of our Lord, one thousand, nine hundred and one.

Whereas, on November 15th, 1901, the circuit court of appeals for the ninth circuit, in a suit pending on appeal in said court between The Pacific Land & Improvement Company, a corporation, as complainant, and The Elwood Oil Company, a corporation, Bakersfield & Fresno Oil Company, a corporation, Kern River Oil Company, a corporation, and Black Jack Oil Company, a corporation, defendants, a judgment and decree was rendered against the said complainant, The Pacific Land & Improvement Company, a corporation, and the said complainant, The Pacific Land & Improvement Company, having obtained from said court an order of appeal to

92 reverse the said judgment and decree in the aforesaid suit:

Now the condition of the above obligation is such, that if the said complainant, Pacific Land & Improvement Company, a corporation, shall prosecute said appeal to effect, and shall answer all costs, if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PACIFIC LAND & IMPROVEMENT CO.,
By SHIRLEY C. WARD, *Its Attorney.*
EDWIN A. MESERVE.
T. C. VAN NESS.

UNITED STATES OF AMERICA, } ss:
Ninth Judicial Circuit, }

Edwin A. Meserve and T. C. Van Ness, being duly sworn, each for himself, deposes and says, that he is a householder in California, and within the ninth judicial circuit, and is worth the sum of five hundred ($500) dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

T. C. VAN NESS.
EDWIN A. MESERVE.

Subscribed and sworn to before me, this 2nd day of December, 1901, by Edwin A. Meserve.

[SEAL.] ELIZA P. HOUGHTON,
Notary Public in and for the County of Los Angeles, State of California.

Subscribed and sworn to before me this 4th day of December, 1901, by T. C. Van Ness.

[SEAL.] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

Form of bond and sufficiency of sureties approved.

WM. W. MORROW, *Judge.*

(Endorsed:) Bond on appeal. Filed Dec. 5, 1901, F. D. Monckton, clerk.

93 United States Circuit Court of Appeals for the Ninth Circuit

THE PACIFIC LAND & IMPROVEMENT COMPANY, a Corporation, Appellant,
v.
THE ELWOOD OIL COMPANY, a Corporation, ET AL., Appellees. } No. 672.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing ninety-two (92) pages, numbered from one (1) to ninety-two (92), inclusive, entitled volume I, Transcript of Record, in connection with the accompanying transcript of remainder of record, marked volume II and numbered from pages one (1) to two hundred and ninety-two (292), inclusive, to be a full, true and correct copy of the printed transcript of the record and of the printed transcript of remainder of the record, respectively, and of the assignment of errors and of all proceedings, including the opinions filed, in the above-entitled case, as the originals thereof remain of record in said United States circuit court of appeals for the ninth circuit.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit at San Francisco, California, this 16th day of December, A. D. 1901.

F. D. MONCKTON, *Clerk.*

94 UNITED STATES OF AMERICA, *ss*:

The President of the United States to Elwood Oil Company, a corporation; Bakersfield and Fresno Oil Company, a corporation; Kern River Oil Company, a corporation, and Black Jack Oil Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Pacific Land and Improvement Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered on November 15th, 1901, against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city and county of San Francisco, State of California, this 5 day of December, A. D. 1901.

WM. W. MORROW,
Circuit Judge.

95 [Endorsed:] No. 672 Circuit court of appeals for the ninth circuit Pacific Land & Improvement Co. appellant *vs.* Elwood Oil Co. *et al.* appellees Citation on appeal Received copy this 6th day of Dec. 1901 Frank H. Short Geo. W. Baker C. Linkenbach J. S. Chapman attorneys for defendants Filed Dec. 11 1901 F. D. Monckton, clerk. Van Ness & Redman, attorneys and counsellors at law, Mills building, San Francisco, Cal.

Endorsed on cover: File No. 18364. U. S. C. C. of appeals, 9th circuit. Term No. 511. Pacific Land and Improvement Company, appellant, *vs.* Elwood Oil Company, Bakerfield and Fresno Oil Company, Kern River Oil Company, and Black Jack Oil Company. Filed January 9, 1902.